



IRCP

Institute for International Research on Criminal Policy
Ghent University

Prof. Dr. G. Vermeulen – Pre-trial detention, custodial sentences, probation and alternatives – Trier, 29 June 2011

Pre-trial detention, custodial sentences, supervision of probation measures and alternative sanctions

Prof. Dr. Gert Vermeulen

Summer Course on European Criminal Justice
ERA – Trier, 29 June 2011



Context and approach

- > context: MR of sentences/sanctions in criminal matters
 - > except
 - > confiscations (previous speaker) and financial penalties
 - > disqualifications
 - > after break: criminal records & taking account of convictions
 - > NB: FD 2009/299/JHA on trials in absentia
 - > introducing enhanced guarantees in FD's EAW, MR financial penalties, MR confiscation, MR custodial sentences
- > approach: antecedents, novelties and problems
 - > pre-trial detention and alternatives
 - > custodial sentences (focus)
 - > including 'transfer back' & '*aut dedere aut exequi*' scenario's EAW
 - > probation measures & alternative sanctions (indirectly covered only)



Pre-trial detention & alternatives

- > 2002 FD on the EAW and the surrender of persons
- > FD 2009/829/JHA on supervision order
 - > MR of decisions on supervision decisions as an alternative to provisional detention
 - > goal good but lack of clarity about scenario's (one or two)
 - > 1st: person concerned in forum state
 - > transfer to home state unregulated
 - > back transfer through EAW guaranteed
 - > even for offences to which EAW does not apply
 - > 2nd: person already in home state
 - > no explicit mention of scenario in FD
 - > whereas chief alternative to disproportionate use EAW
- > assessment: MR improves previous situation
 - > no solid arguments for MR flanking measures



Custodial sentences & alternatives

- › 2002 FD on the EAW and the surrender of persons
- › FD 2008/909/JHA on MR custodial sentences & deprivation of liberty
 - › revisiting EAW for 'transfer back' and '*aut dedere aut exequi*' scenario's
 - › + new autonomous transfer of prisoner mechanism
 - › buzzwords/official rationale: social rehabilitation & succesful reintegration
 - › however position prisoner/executing MS radically changed
 - › antecedents:
 - › 1983 CoE transfer of prisoner Convention + 1997 Protocol
 - › humanitarian (1983) + escape/expulsion scenarios (1997)
 - › assessment: MR creates new problems (infra)
- › FD 2008/947/JHA on probation orders & alternative sanctions
 - › antecedents: 1964 CoE convention
 - › general assessment: good: new possibilities favouring mobility
 - › similar new problems, but less problematic (person has freely returned or wants to return to MS where he/she is lawfully and ordinarily residing)



FD 2008/909/JHA - introduction

- > comparable problems as for pre-trial detention, be it more relevant
- > IRCP study on detention in the EU 27 as lead-up to EC initiative
 - > announced in Commission Action Plan Stockholm Programme
 - > underlying hypothesis
 - > mutual trust required lacks trust basis, because of
 - > too significant differences between
 - > material detention conditions
 - > laws governing the execution of sentences
- > finalized now!
 - > COM (2011) 327 (14.06.2011): new 'detention' GP (side doc)
 - > parallel launch IRCP detention study (2 books, open access)
 - > http://ec.europa.eu/justice/news/consulting_public/news_consulting_0012_en.htm

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Cross-border execution
of judgements
involving deprivation
of liberty in the EUOvercoming
legal and
practical
problems
through
flanking
measures

The introduction in 2008 of the Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union sparked discussions as to whether the practical operation of the instrument would be compatible with its very objective, being the enhancement of detained persons' social rehabilitation prospects.

Transferring detained people back to their respective Member State of residence and/or nationality within the mutual recognition framework is somewhat precarious in light of the often substantial variety of Member States' legal and prison systems. In this context, and following a call for tender by the European Commission, the authors conducted the biggest study to date on Member States' material detention conditions, early/conditional release provisions and sentence execution modalities. In addition to exploring the diversity of legal frameworks, the study also assessed practitioners' views on cross-border execution of custodial sentences in the EU.

This book contains both the EU level legal and practitioners' analyses as well as the high level final report to the study, confirming preliminary concerns that flanking measures are urgently needed for a proper operation of the Framework Decision.

This is essential reading for EU policy makers, judicial and law enforcement authorities and for defence lawyers throughout the Union. Undoubtedly, this book will be an asset to everyone who is involved in or taking an interest in detention issues and cross-border execution of judgements involving deprivation of liberty in the EU.

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Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States

Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States

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This book contains the individual Member State reports resulting from the legal and practitioners' analyses, backed by additional information drawn from monitoring and evaluation conducted at Council of Europe (Committee for the Prevention of Torture) and United Nation levels.

This is essential reading for EU policy makers, judicial and law enforcement authorities and for defence lawyers throughout the Union. Undoubtedly, this book will be an asset to everyone who is involved in or taking an interest in detention issues and cross border execution of judgements involving deprivation of liberty in the EU.

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FD 2008/909/JHA

- > revisiting 2002 FD on the EAW for 'transfer back home' and *aut dedere aut exequi* scenario's
- > + new autonomous compulsory transfer of prisoner mechanism to MS of nationality and residence
- > buzzwords (official rationale)
 - > social rehabilitation and succesful reintegration
- > however position prisoner/executing MS radically changed
- > antecedents
 - > 1983 CoE transfer of prisoner Convention + 1997 Protocol
 - > humanitarian (1983) + escape/expulsion scenarios (1997)
- > assessment (IRCP study – methodology)
 - > MR creates new problems
 - > flanking measures to be considered



Methodology

- > EU-level and MS legal analysis
 - > European/int'l norms & standards relating to detention conditions, sentence execution and prisoner transfer
 - > UN, CoE (EPR-centered + CPT/ECtHR) and EU
 - > full national perspectives + uploads
 - > through SPOC-network & online questionnaires
- > practitioner's survey (cross-border analysis)
 - > implementation seminars + online questionnaires
 - > defence lawyers – judges – prison administrators
- > additional int'l/European stakeholder consultation
- > validation workshop



MS overall compliance

Country	Y %	N %	Country	Y %	N %
Finland	100	0	Latvia	67	34
Slovakia	98	3	Czech Republic	66	35
Estonia	97	4	Austria	65	36
Hungary	93	8	France	65	36
Germany	84	17	Romania	65	36
Belgium	82	19	Greece	62	39
Malta	78	23	Netherlands	60	41
Denmark	74	27	Lithuania	55	46
Slovenia	74	27	UK	55	46
Spain	74	27	Bulgaria	53	48
Italy	72	29	Poland	51	49
Cyprus	69	32	Ireland	32	69



Problems (1)

- social rehabilitation (cornerstone)
 - info on material detention conditions
 - standards relating to the progression principle, to ties with friends and family and to educational, recreational, work/training and welfare programmes
- knowledge of the FD and (access to) information on foreign law & practices
- compulsory nature FD & poor procedural status
- dual criminality issues
- 'conversion' issues resulting from significant variations in MS' sanctions & sentence execution modalities, early/conditional release, earned remission and suspension of sentence provisions (infra)



Problems (2) - 'Conversion' issues

- > executing MS can adapt, refuse to recognise or enforce a sentence if containing aspects which cannot be executed in accordance with legal system – Articles 8.2/8.3 & 9.1 (k)
 - > incompatibilities concerning duration and nature
 - > adaption according to sanction for similar offences
 - > difficult in case of lack of dual criminality
 - > should not result in aggravation
 - > but: no obligatory *lex mitior* rule, considerable discretion – no agreed severity ranking
 - > psychiatric/health care, home detention, electronic monitoring, etc
- > possible withdrawal certificate if law executing MS on early or conditional release unsatisfactory to issuing MS
- > wholly forgotten: conversion problems with execution modalities
 - > electronic monitoring, house or weekend arrest, etc



Problems (3)

- > competent authorities
 - > judge or penitentiary administration (automatism)
- > free movement of persons?
- > *de facto* discrimination on basis nationality?
- > position of the victim?
- > subordinate material detention conditions (highlights)
 - > overcrowding: cell sharing, cell size and cell capacity
 - > sanitation facilities, clothing, bedding and nutrition: privacy, screening and appropriate clothing
 - > health care: injury detection, women's health care, forced feeding and hunger strikers, monitoring prisoners at risk of suicide, medical examination (upon arrival), accommodation of vulnerable prisoners
 - > other: special cells, recording, staff contact, monitoring, security assessments, protection status and strip searches



Flanking measures (1)

- enhancing knowledge and (access to) information
 - implementation handbook, training and monitoring
 - access to information
- protection of prisoners' (fundamental) rights by improving material detention conditions
 - training and best practice promotion
 - increasing the frequency of CPT inspections
 - introducing binding European minimum standards
 - need – EU competence – political feasibility



Flanking measures (2)

- > maintaining the double criminality requirement (+ EULOCS)
- > safeguarding sentencing equivalence & supporting sentence execution through
 - > approximation: 2 generic severity rankings
 - > dual lex mitior + no unreasonable aggravation (review)
- > improving prisoners' procedural rights
 - > introducing a motivational duty for issuing states
 - > including re sufficiently high material conditions
 - > right to an 'informed' opinion + to legal assistance
 - > competent authorities necessarily judicial bodies?
 - > no, but right to a judicial review



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Questions and discussion
